No. 2617.

United States Circuit Court of Appeals

For the Ninth Circuit

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, an Hawaiian Corporation,

Plaintiff in Error,

vs.

GEORGE E. WARD,

Defendant in Error.

Error to the Supreme Court of Hawaii.

BRIEF FOR DEFENDANT IN ERROR

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Filed this.....day of October, 1915.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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The assignments of error in this cause substantially present for consideration the following points of law, as the plaintiff in error claims the evidence shows:

First: There was no proof of negligence.

Second: The proximate cause of the injuries was the act of defendant in error.

Third: The negligence of plaintiff in error, if any, was not the proximate cause of the injuries.

Fourth: Contributory negligence of defendant in error, and

Fifth: Assumption of risk.

For convenience we will hereafter refer to the defendant in error as the "plaintiff," and to the plaintiff in error as the "defendant," and will endeavor to discuss the errors assigned in the order above set forth.

First: *The question of defendant's negligence.*

It is elementary that the law imposes upon the master the duty of furnishing the servant, first, a reasonably safe place in which to work, and, second, reasonably safe and suitable appliances with which to perform his labor. If he fails in either of the above respects and the servant is injured thereby, while in the exercise of ordinary care, the master is liable in damages for the injuries sustained, provided the servant has not assumed the risks of the employment.

Actionable negligence has been defined as

> "The failure to do what a reasonable and "prudent person would ordinarily have done "under the circumstances of the situation, or "doing what such person would not have done."
>
> *Grand Trunk Ry. Co.* vs. *Ives,* 144 U. S. 408, 416.

The first question arising from the evidence in this case is: Did the defendant fail to furnish the plaintiff (defendant in error) with a reasonably safe and suitable cable for use on its coal conveyor?

We will endeavor to briefly point out wherein the record discloses such failure.

The condition of the cable was first observed about a month prior to the injuries complained of. At that time "the wires and strands" were wearing off and sticking out. (Printed Record, p. 94), the secretary and treasurer of the defendant being aware of such fact at the time. (Rec., p. 94). As time went on the condition of the cable was becoming worse, due to constant use (Rec., p. 98). On the Saturday immediately prior to the injuries the wires were sticking out from one-sixteenth of an inch to an inch (Rec., p. 99). This condition was general throughout the cable, which was 2800 feet in length (Rec., pp. 99-100). That the cable had come off the pulleys at the scene of the injury two or three times prior to the accident and injuries (Rec., p. 100). On the Saturday immediately prior thereto it was observed that the cable "slipped and kept going up and down around the pulleys" (Rec., p. 106), due to its defective condition (Rec., p. 176). That prior to these occasions the cable had never been known to come off the pulleys at this point (Rec., p. 175), and a cable in good condition would not come off at this part of the conveyor (Rec., p. 191), nor would it rise and fall (Rec., p. 70). Upon observing the defective condition of the cable on Saturday, July 6, 1912, and its tendency to "climb" or rise on the pulleys, the plaintiff advised the secretary and treasurer of such fact, who promised to install a new one (Rec., 178). That plaintiff relied on the promise and continued in his employment pursuant thereto (Rec., 179), because he knew that if the regular

foreman (Akina) in charge of the superstructure of the conveyor was elsewhere engaged he would be called upon to replace the same (Rec., 191). The general operation and supervision of the conveyor were in charge of Akina, the foreman thereof (Rec., p. 152). The main duties of plaintiff were to supervise or boss a gang of laborers in the holds of discharging coal ships so that such vessels might be expeditiously unloaded.

From these facts the jury were authorized to find:

First: The cable was in a defective condition at the time of the injuries and had been so for a month prior thereto.

Second: The defendant was aware thereof.

Third: The cable, due to its defective condition, came off the pulleys two or three times prior to the injuries, the last occasion being on Saturday, immediately prior thereto.

Fourth: That the defendant was aware of these facts, and upon complaint being made promised the plaintiff that it would install a new cable.

Fifth: That plaintiff continued in his employment in reliance upon such promise.

Sixth: That the cable was neither suitable, efficient nor reasonably safe for the purpose required of it.

Counsel in their brief (pages 23-25) would lead the Court to believe that either the crowbar or the cable slipped and "Ward lost his balance and fell

over the edge to the wharf below." In other words that the injuries were due to Ward losing his balance due to accident. This is neither a correct statement of the evidence, nor a reasonable inference therefrom. It was not an accidental slipping or losing his balance, but the cable itself which came off and carried him, bar and all, to the wharf below. (Rec., p. 309).

The mere fact that no injury had occurred prior to the day of the accident furnishes no room for argument that the cable was neither unsafe, unsuitable nor dangerous. One may as well argue that a loaded shotgun is not a dangerous weapon until it is fired and either injures or kills someone. Indeed the best proof of the dangerous and unsafe condition of the cable was afforded by the accident itself. The evidence shows that the cable, due to its defective condition, left its position, and then it did become a dangerous instrument, because in that event the plaintiff, during the temporary absence of Akina, the foreman of the conveyor, might be called upon to leave his employment on the ship and replace the cable. This would necessarily enhance the risk of injury. So, therefore, we respectfully submit that the failure to provide a suitable and reasonably safe cable was negligence.

The only questions remaining are:

(a) Was such negligence the proximate cause of the injuries?

(b) Were the injuries sustained one of the ordinary risks of plaintiff's employment, in view of the facts and surrounding circumstances?

The Negligence of Defendant Was the Proximate Cause of the Injuries.

As a general rule, in order to establish proximate cause, it is necessary that there be a causal connection between the negligent act and the injury. The act must have been such that without it the injury would not have happened.

29 Cyc. 489, 490.

Where the consequences of a negligent act follow in unbroken sequence, so as to produce naturally the injury complained of, the rule is easy of application. So, in this case, if the cable had broken while in operation, due to its defective condition, and the plaintiff had been injured thereby, there would be no question as to the proximate cause of the injuries. While not waiving the position that the injuries followed in unbroken sequence from the original act of negligence, yet we believe the solution of the question depends more on the application of other principles of the law of proximate cause.

Where the Negligence of the Master Sets in Motion Another Agency, Which in Turn Produces Injury, He Is Liable For the Damage Sustained.

Where the master by his own negligent act has set in motion another instrumentality or agency,

which in turn produces injury, he cannot escape liability by claiming that his negligence was not the proximate cause of the injury.

> Watson on Damages for Personal Injuries, Section 65.

In the case at bar the defendant violated its legal obligation to furnish its servants with reasonably safe and suitable appliances by maintaining in use a defective cable, known by it to be defective, which caused it to have a tendency of climbing upon and slipping from the pulleys. It had actual knowledge that the cable, due to its defective condition, had left its position on the Saturday immediately prior to plaintiff's injuries. It further knew that in the event it came off the pulleys it would have to be replaced, and in the act of replacing some injury might occur. It further knew that in the absence of Akina, the regular foreman having charge of the superstructure of the conveyor, the plaintiff would attempt to replace it. By negligently maintaining in operation the cable in question it necessarily set in motion a human agency, to-wit plaintiff's act, which in turn concurred in producing the injury. The act of plaintiff in attempting to replace was the direct result of defendant's negligence, without which he would not have been called upon to engage in this hazardous work, and without which the injuries would not have happened. Plaintiff's act in replacing was not an *independent, unrelated* act, but was closely connected with, dependent upon, re-

lated to defendant's negligence, and made necessary by it.

The negligence of defendant produced or gave rise to a certain condition or consequence, to-wit: the cable was off the pulleys. The defendant was at least responsible for this, because the record shows that a suitable cable could and did not leave the pulleys at this part of the conveyor, because "there was nothing there to make it come off" (Rec., pp. 191-192). This condition or consequence, coupled with plaintiff's act, became in turn the cause of the injury. It would be sophistry to contend that while the negligence of defendant was directly responsible for one cause or condition, yet it should not be held liable for the agency set in motion by its own negligence, which ultimately resulted in injury. If such were the law it would afford the wrongdoer an opportunity of apportioning or qualifying his own wrong.

> "It is equally true that no wrongdoer ought "to be allowed to apportion or qualify his own "wrong; and that as a loss has actually hap- "pened while his own wrongful act was in force "and operation he ought not be permitted to "set up as a defense that there was a more im- "mediate cause of the loss, if that cause was "put into operation by his own wrongful act. "To entitle such party to exemption he must "not only show that the same result might have "happened but that it must have happened if "the act complained of had not been done."

Baltimore Ry. Co. vs. *Reaney,* 42 Md. 136.

See also: Baldwin on Personal Injuries, Sec. 13.

Selleck vs. *Ry. Co.,* 93 Mich. 375.

Is there any evidence in the record which shows or tends to show that if the defendant had provided a suitable cable the injuries would, or must have happened? On the contrary, it affirmatively appears that the injury would not have resulted if the defendant had fulfilled its legal obligation by furnishing a proper and suitable appliance. The testimony of the witnesses for plaintiff shows (although contradicted by defendant) that a proper and suitable cable would not and did not leave the pulleys at this point, prior to the occasions described by them. This was a question of fact solely within the province of the jury to determine.

There were two causes which co-operated in producing the injury. First, the negligence of defendant in causing the cable to come off the pulleys, and second, the act of plaintiff in attempting to remedy a consequence or condition caused by such negligence. Both of these acts were closely related, one being made necessary and caused by the other. The negligence of the defendant was the predominating, superior and efficient force, while plaintiff's act was dependent upon, incidental, and subordinate to the controlling agency of defendant.

"Where two or more causes co-operate to "produce the damage resulting from a legal in-

"jury, the proximate cause is the originating "and efficient cause which sets the other causes "in motion. The relation of cause and effect "between the tortious act and the intervening "agencies being shown, the same relation be- "tween the primary wrong and the subsequent "injuries is also established; the first wrongful "act operating through a succession of circum- "stances, each connected with and originating "by the next preceding. Thus the primary "cause may be the proximate cause of a disas- "ter in the sense of nearness of causal relation, "though it may operate through successive in- "struments. It is not essential, therefore, for a "plaintiff to show that an act claimed to have "been the proximate cause of a certain result, "was the only cause. It is sufficient, if it be "established that the defendant's act produced "or *set in motion other agencies which in turn "produced or contributed to the final result.*"

Watson on Damages for Personal Injuries, Section 65.

"Although a defendant is not responsible for "any events produced by *independent interven- "ing circumstances which have no connection "with the primary act,* if the intervening agen- "cies are put in operation by the wrongful act "of the defendant, the *injuries directly pro- "duced by such agencies* are proximate conse- "quences of the primary cause, though they "may not have been contemplated or foreseen."

East Tenn. R. R. Co. vs. *Lockhart,* 79 Ala. 315.

See also: *Columbus R. R. Co.* vs. *Newsome,* L. R. A. 1915 B., p. 1111.

Bishop on Non-Contract Law, Sec. 457.

Pennsylvania R. Co. vs. *Hammil* (N. J.), 24 L. R. A. 535.

Of course if a new and independent force intervenes between the original act of negligence and the injury the causal connection is broken and no recovery may be had. An intervening efficient cause has been defined as

> "A *new* and *independent* force which breaks "the causal connection between the original "wrong and the injury, and itself becomes the "direct and immediate, that is the proximate "cause of the injury."

Pullman Palace Car Co. vs. *Laack,* 14 American Neg. Cas. 303; (s. c. 143 Ill. 242).

In the case at bar the test is, was there a *new,* independent force, disconnected from and unrelated to the original wrong and self operating, which broke the causal connection? We respectfully submit that the evidence fails to disclose such fact, either by inference or otherwise. On the contrary each act in the chain of circumstances ultimately resulting in injury was dependent upon, related to and induced by the preceding. The original wrong was the controlling agency, and without which the injuries would not have occurred. It was the primary cause which produced the damage. If the

cable had been in proper condition it would not have come off the pulleys. If it had not come off the pulleys there would, of course, have been no necessity of replacing it. Thus it was the cause, without which the injuries would not have been sustained.

"If the first cause was such that but for it "the injury would not have happened, the mas- "ter is liable."

Thompson Com. Law of Neg. (2nd Ed.), Sec. 56;

Ohio Etc. Ry. Co. vs. *Trowbridge,* 126 Ind. 391, 395;

Ring vs. *Cohoes,* 77 N. Y. 83;

Ehrgott vs. *N. Y.,* 96 N. Y. 265, 283;

29 Cyc., p. 500;

Selleck vs. *Ry. Co.,* 93 Mich. 380, citing;

Campbell vs. *City of Stillwater,* 32 Minn. 310;

Thompson, Com. Law Neg., Vol. 4, Sec. 3857;

Baldwin Personal Injuries, Sec. 13.

DOCTRINE OF FORESEEING RESULTS.

While it is a general rule in order to fix liability, it should appear that it should have reasonably been foreseen by the master that injurious results might result or flow from his act (1 Cooley on Torts (3rd Ed.) 124, 125; *Southside Pass. Co.* vs. *Trich,* 117

Pa. St. 390). It is not necessary in order to make him liable, that the particular injurious consequences and the precise manner of the infliction of the injuries should have been foreseen by the wrongdoer. It is sufficient if the wrongdoer *might,* by the exercise of ordinary care, have foreseen that *some* injury might result from his act.

Heiting vs. *Chicago R. R. Co.,*

Am. Ann. Cases, 1912 D, p. 451; (s. c. 252 Ill. 466; 96 N. E. 842);

Baldwin Personal Injuries, Sec. 15;

Thompson on Negligence (2nd Ed.), Sec. 59;

The Pullman Palace Car Co. vs. *Laack,* 143 Ill. 242;

Miller vs. *St. Louis Ry. Co.,* 90 Mo. 389.

We respectfully submit it is a reasonable inference from the evidence that the defendant should or might have foreseen that some injury might result from its negligence. This is especially so in view of the fact that the coal conveyor at this particular part thereof was absolutely unprotected by rail or platform, and at an elevation of twenty-five feet above the wharf below. That there was liability of injury is shown by the testimony of Akina, the foreman (Luna) who, when he noticed the jumping motion of the cable on the Saturday immediately preceding the injury, "grabbed hold of the boy and shoved him back" out of danger to a position of

safety. (Pr. Record, p. 102). This was a question for the jury. (Am. & Eng. Ency. Law (2nd. Ed.), p. 509).

The nearest cause is not the *proximate cause of a disaster, unless it is disconnected from and independent of the original wrong.*

The main contention of the defendant in this case is that its negligence, if any, is remote and that the proximate cause of the injury is to be attributed not to any negligence of which it might have been guilty, but to the act of plaintiff himself in attempting to replace the cable. It bases its contention upon the theory that after the engine had stopped and the cable brought to rest, it was lying inert on the conveyor and therefore incapable in such state of producing injury. In other words, when the engine was stopped and the cable brought to rest, all danger had ceased, and it was the act of plaintiff himself in attempting to replace which was the efficient and predominating cause of the injury. This is true in the sense that if the plaintiff had not attempted to replace, and had gone off and left his employment, the accident and injury would certainly not have happened. So if he had remained at home that day, or had never been born. But the defendant evidently loses sight of the fact that it should reasonably have been anticipated by it that Ward would not pursue such course, but on the contrary would attempt to replace the cable in the manner which he employed. But was Ward's act an

independent, unrelated, self operating force, which had no connection whatsoever with the act of the defendant? It is unquestionably true that plaintiff's act was possibly the more immediate cause or occasion of the injury, in point of time, yet as we will contend later in this brief, the jury were warranted in inferring from the evidence that the defective condition of the cable *was the prime factor* in causing it to finally leave its position and thus producing the injury. So therefore the question is not whether the attempt to replace was the more immediate cause and nearest in time to the disaster, but rather whether such act was induced by, subordinate to and dependent upon the superior negligence of the defendant.

> "The act of the injured party may be the "more immediate cause of the injury, yet if that "be an act, which was as to him *reasonably in-"duced by the prior misconduct of the defend-"ant,* and without any concurring fault of the "sufferer, that misconduct will be treated as "the responsible and efficient cause of the dam-"age."

Sutherland on Damages (3rd Ed.), Sec. 39.

> "The proximate cause is the efficient cause, "the one that necessarily sets the other causes "in operation. The causes that are merely inci-"dental or instruments of a superior or con-"trolling agency are not the proximate causes "and the responsible ones, though they may be "nearer in time to the result. *It is only when*

"the causes are independent of each other that "the nearest is, of course, to be charged with "the disaster." L

Insurance Co. vs. *Boon,* 95 U. S. 117.

(8 Ency. Sup. Ct. U. S. Rep., p. 881).

"The question, therefore, when an injury is "done, is whether there is any responsible per- "son, who could, if he had chosen, have prevent- "ed it, but who, either seeing the evil conse- "quences or negligently refusing to see them, *has "put into motion either negligently or intention- "ally a series of material forces by which the in- "jury is produced.* This is the basis of the dis- "tinction between conditions and causes. We "may concede that all the antecedents of a par- "ticular event are conditions without which it "could not exist; and that in view of one or an- "other physical science, conditions not involving "the human will are spoken of as causes. But "except so far as these conditions are capable "of being moulded by human agency, the law "does not concern itself with them. Its object "is to treat as causes only those conditions "which it can reach, and it can reach those only "by acting on a responsible human will. It "knows no cause therefore except such a will; "and the will, when thus responsible, and when "acting on natural forces in such a way as "through them to do a wrong, it treats as the "cause of the wrong. As a legal proposition "therefore we may consider it established that "the fact that the plaintiff's injury is preceded "by several independent conditions does not

"relieve the person by whose negligence one of "these antecedents has been produced from "liability for such injury."

Law of Negligence, Wharton (2nd Ed.), Sec. 85.

We respectfully take the liberty of again quoting from a decision of the Supreme Court of the United States, on the distinction between causes and conditions, which we claim bears an important part in determining the question before the Court:

"In a consideration of this subject it is im- "portant to note well the distinction between "conditions and causes. If the intervening act "upon which the defendant relies is a mere con- "dition or occasion and not an efficient cause, he "will be held liable. Hence it matters not how "many causes have intervened; if the defend- "ant's act is still the efficient cause, he is liable "for the injury. The test is: *Was it a new and "independent force acting in and of itself in "causing the injury and superseding the origi- "nal wrong complained of so as to make it "remote in the chain of causation;* although it "may have remotely contributed to the injury as "an occasion or a condition thereof."

Milwaukee Ry. Co. vs. *Kellogg,* 94 U. S. 469.

The reasoning contained in the text above quoted may well be applied to the case under consideration. Was the act of plaintiff in attempting to replace "a new and *independent force* acting in and of itself" and "superseding the original wrong so as to make

it remote in the chain of causation''? Did the force employed by plaintiff ''act in and of itself'' or was it induced by the act of defendant? What was there in the act of plaintiff which superseded the original wrong so as to make it remote in the chain of causation? The whole transaction dovetails. A certain cause produced a certain consequence or condition which, in turn, became the cause of the injury.

It would be contrary to all principles of natural justice to hold that, although the defendant furnished a defective and unsuitable cable, which left its position by reason of such defect, thereby requiring it to be replaced, yet no recovery could be had because plaintiff failed to affirmatively show that such defective condition was the sole cause of its finally leaving the pulleys and producing the injuries.

> ''The law is a practical science, it has been ''said, and Courts should not indulge in sub-''tleties as to causation that would defeat the ''claims of natural justice. They rather adopt ''the practical rule that the efficient and pre-''dominating cause, when producing a given ''event or effect, though there may be subordi-''nate and dependent causes in operation, must ''be looked to in determining the rights and ''liabilities of the parties concerned.''
>
> Watson on Damages Personal Injuries, Sec. 65.

In the case at bar, it was impossible for the plaintiff or any other human being to affirmatively

prove that the cable finally left its position solely by reason of its defective condition. But we respectfully contend it was not incumbent upon him to affirmatively prove such fact. An efficient, predominating cause having been found, the injurious results should be considered as consequences of the original wrong and proximate to it.

> "The practical administration of justice pre-
> "fers to disregard the intricacies of metaphysi-
> "cal distinctions and subtleties of causation and
> "to hold that the injury as to natural and proxi-
> "mate cause and consequence is to be answered
> "in accordance with common sense and common
> "understanding."
>
> *Southern R. R. Co.* vs. *Webb,* 59 L. R. A. 111, 112.

The case just cited is a most instructive one and discusses at length the various elements of the law of proximate cause.

As will be observed in this brief, we have not deemed it necessary to burden the Court with a citation of a large number of cases, or a discussion of the particular facts thereof. Each case must necessarily be decided on its own facts. There is one case, however, the facts of which are analogous to the case at bar.

The plaintiff in that case was employed by defendant as a fireman on one of its locomotives, which was sent out in a defective condition, and while on the road got out of order. It was the duty

of the plaintiff to make emergency repairs while on the road. An examination disclosed that what was called the "eccentric" was broken. While engaged in making the necessary repairs the "straps" which fastened the "eccentric" to the axle broke and injured the plaintiff. The Supreme Court of Oklahoma held that the failure to inspect the engine before it was sent out from the roundhouse was the proximate cause of the injury. The Court said, p. 706:

> "But in this case the repairs, under the "circumstances, were made necessary by the "negligence of the company, and enhanced the "risk of injury. The intervention of the act "of the plaintiff between the negligence of the "company and the injury should have been "anticipated. When the engine broke it became "necessary to repair. The plaintiff could not go "off and leave it. It should have been foreseen "that he would attempt to remedy the defect "and thereby incur the risk of injury. The "defendant is charged with knowledge of the "defect, and knowing the defect it must have "known that some sort of injury was likely to "result. It must have known that if nothing "worse happened the shaft would break, and "that it would become necessary to repair it, "and thereby the risk of injury would be en- "hanced. It is true, as argued by the defend- "ant, the plaintiff could have gone off and left "the engine, but it should have been so anticipat- "ed that he would not do so, and that he would "attempt to repair it just as he did."

Chicago, R. I. & P. R. Co. vs. *Moore,* 43 L. R. A. (N. S.) 701, 706.

The legal principles laid down in the Moore case, *supra,* and the facts upon which they are based, may readily be applied to the case at bar. In the Moore case, the failure to inspect was negligence. In the case at bar there was a defective cable, the maintenance of which by the defendant was negligence. In the Moore case the Court held that it might reasonably have been anticipated if a breakdown occurred the plaintiff would attempt to remedy the defect and thereby incur the risk of injury. In the case at bar the defendant might reasonably have anticipated that the cable would come off the pulleys, that plaintiff would attempt to replace it, thereby incurring the risk of injury. In the Moore case, it was not the "eccentric" which caused the injury, but the "straps". In the case at bar, it was the defective cable which first came off and then hurled the plaintiff to the wharf below. The Moore case simply applies the well-known rule that where the negligent act sets in motion another agency which in turn causes injury the original wrongdoer is responsible for all the injurious consequences, if the intervention of such agency could have reasonably been foreseen by him; and whether the intervention of such agency should have been foreseen is a question for the jury, under proper instructions from the Court.

21 Am. & Eng. Ency. of Law (2nd Ed.), p. 509.

"The practical solution of this question ap-
"pears to us to be that a person guilty of negli-
"gence should be held responsible for all the
"consequences which a prudent and experienced
"man, fully acquainted with all the circum-
"stances, which in fact existed, whether they
"could have been ascertained by reasonable dili-
"gence or not, would have thought at the time
"of the negligent act reasonably possible to
"follow if they had been suggested to his
"mind."

Vol. 1, Shearman & Redfield on Negligence (4th Ed.), Sec. 29.

The only qualification in the Moore case, and which was one of the grounds of the dissenting opinion of Mr. Justice Perry, when the case was first before the Supreme Court of Hawaii, on error from a judgment of nonsuit, was where the evidence showed that the servant was engaged for the particular purpose of making repairs. In such event he would be held to assume all risks, whether due to negligence or not. The very character of his employment would necessarily preclude recovery for injury sustained while engaged in repairing. But we respectfully submit a reasonable interpretation of the evidence in this case *does not bring the plaintiff within the terms of this exception.* He was employed by the defendant as a machinist in its machine shops (Rec., p. 149) and was only sent down to the coal conveyor when foreign coal ships came in (p. 151), and his principal employment on

such occasions was superintending a gang of laborers in the holds of discharging coal ships (Rec. 152). The operation of the coal conveyor was in charge of another man, to-wit, James Akina (Rec. 152), who made all necessary repairs thereon (Rec. 173). If the engines happened to get out of order, Mr. Gedge, the secretary and treasurer of defendant, would send for plaintiff and he would go down to the conveyor (Rec. 174). But the cable and the working thereof were directly in charge of Akina, and all repairs to and the installation of the cable were under Mr. Williamson, who was specially employed by the defendant for that purpose (Rec. 174-425).

The replacing of the cable was not in the nature of a repair. It was merely readjusting a defective and unsuitable appliance to its proper position, so that operations might be resumed. There was nothing relating thereto which required the exercise of mechanical skill. It was neither Ward's particular duty, nor was he specially employed to keep the cable in position; although if the regular foreman (Akina), in charge of the superstructure of the conveyor, happened to be elsewhere engaged thereon, the plaintiff might be called upon to replace the cable. Indeed, the fact that plaintiff made complaint to the proper official of the defendant on Saturday immediately prior to his injuries and received assurances that a new and suitable cable would be installed, negatives the position taken by Justice Perry in his dissenting opinion that plaintiff had assumed all

risks attendant upon the negligence of the defendant in failing to provide a suitable or proper appliance. It is neither a fair, just nor reasonable inference from the evidence in the case. Although the servant assumes the ordinary risks incident to his employment, yet he cannot be held in law to assume the risks of a defective appliance which the master has promised to remedy. The maintenance of such an appliance enhances the risk of injury, to which the servant would not be exposed if the master performs the obligation which the law imposes upon him. In the present case it was the legal obligation of defendant to provide its servants with reasonably suitable appliances. It failed in this duty, and such failure was negligence; and the jury were authorized to infer from this fact that such negligence was the efficient, predominate and proximate cause of the injuries sustained. As above quoted, "the law is a practical science, it has been said, and Courts rather adopt the practical rule that the efficient and predominating cause, when producing a given event or effect, though there may be subordinate or dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned."

Watson on Damages, Sec. 65.

Suffice it to say, the plaintiff proved that it was the defective condition of the cable which caused it to leave its position, thereby requiring replacement. The defendant could, by the exercise of ordinary

care, have prevented this condition. A specific act of negligence having been proven, from which the jury could and did in fact find that the injuries resulted, it was neither incumbent upon nor necessary for plaintiff to prove that the injury might have happened from a non-defective cable. This was a matter of defense, and evidence was offered by the defendant which tended to prove this fact. So therefore it became a question of fact for the jury, and by their verdict they necessarily found that the cable left its position by reason of the negligence of the defendant, which could have been avoided by the exercise of ordinary care on its part. By their verdict the jury have necessarily answered this question in the negative.

Was Plaintiff's Act in Replacing the Cause of the Injury, as Distinguished From a Condition or Incident Arising From the Negligence of Defendant.

It may be conceded in a discussion of this question that the injury would probably not have occurred *if the plaintiff had not* tried to replace the cable. Neither would it have happened "if he had never been born, or had remained at home on the day of the injury. Yet no one would claim that his birth or his not remaining at home that day can, in any just or legal sense, be deemed a cause of the injury." (*Smithwick* vs. *Hall,* 59 Conn. 269.) Our inquiry should be directed then to the difference between causes and conditions. A cause is an originating force producing a certain condition or conse-

quence, or conditions or consequences, which naturally operate so as to produce an ultimate effect. Such effect does not always follow as an immediate result of the cause. It may operate through a succession of events, each of which produces certain consequences, depending upon and related to its immediate antecedent, but eventually finding bottom in the ultimate result or effect. It cannot be said that these various consequences, conditions or events can justly be termed causes, in the sense that they are originating forces. It is only when the chain of events is interrupted by the interposition of a new, independent, unrelated and self-operating force can it be legally said that the chain of causation has been broken and a new cause substituted. Where each separate act, condition or event is related to, connected with, dependent upon and made necessary by its immediate antecedent, we take it such acts, conditions or events are not causes in a legal sense which should be regarded as self-operating forces so as to relieve the author of the original wrong. They are to be regarded more in the nature of incidents or conditions which spring from the originating force, without which such incidents or conditions would have no existence. If this reasoning is sound, then it logically follows that plaintiff's act in replacing is to be considered more as an incident or condition, rather than a self-operating, distinct, independent, unrelated and efficient cause of the injuries. It makes no difference whether he employed physical force in attempting to remedy a condition made

necessary by an act of negligence, for the attempt was merely a condition or incident which had its origin in the defendant's fault.

Proximate Cause Is a Question For the Jury.

As a general rule the proximate cause of an injury is ordinarily a question of fact for the jury to determine under proper instructions from the Court.

Thompson Comm. Law of Neg. (2nd Ed.), Sec. 161;

Milwaukee R. R. Co. vs. *Kellogg,* 94 U. S. 469;

Schumaker vs. *St. Paul R. R. Co.,* 46 Minn. 39, 42;

Brown vs. *Chicago R. R. Co.,* 54 Wis. 350-357;

Baltimore St. R. Co. vs. *Kemp,* 61 Md. 619, 622;

Hays vs. *Michigan R. R. Co.,* 111 U. S. 229, 232;

1 Cooley on Torts (3rd Ed.) p. 111;

Sedgwick on Damages (9th Ed.), Vol. 1, Sec. 116;

The Pullman Palace Car Co. vs. *Laack,* 143 Ill. 242;

(s. c. 14 American Neg. Cases, 303.)

"It is not a question of science or of legal "knowledge. It is to be determined as a fact, "in view of the circumstances of fact attend- "ing it."

Milwaukee R. R. Co. vs. *Kellogg,* 94 U. S. 469.

The Jury Could and Did in Fact Find From the Evidence That the Defective Condition of the Cable Was the Proximate Cause of the Injuries.

Mr. Labatt, in his work on Master and Servant (Vol. 2, Sec. 805), states the rule as follows:

> "Whether the breach of duty established in a "given case was the proximate cause of the "injuries is a mixed question of law and fact. "It is primarily for the jury to determine under "proper instructions. A Court will not under- "take to settle it in any case where it involves "the *weighing of conflicting evidence* * * * "*the balancing of probabilities, and the drawing* "*of inferences.*"

In the case at bar it was shown that the cable was defective: that it left its position by reason of such fact, having a tendency to "climb" on the pulleys. Therefore, the jury were at least warranted in inferring that the cable, due to its defective condition, came off the pulleys while it was running. There being no reasonable explanation why the cable finally left the pulleys, it is reasonable that the jury could have inferred that it finally left its position on account of and due to its defective condition. Could not the jury have found from the fact that the wires were "sticking out" at different lengths from a sixteenth of an inch to an inch, it would have a tendency to and did in fact slip while the attempt of replacing was being made? Would not the jury have been warranted in drawing the inference that, as the evidence showed, the cable had a tendency to

slip from the pulleys while in motion, it was probable that this tendency would obtain while at rest, due in all probability to the wires which projected, thus preventing the cable from maintaining the snug position around the pulleys which a proper and suitable cable would have had? Could not the jury have inferred that a cable in the condition as described by plaintiff's witnesses would be more readily dislodged while being replaced? These, we submit, were legitimate inferences which could have been drawn from the facts and surrounding circumstances, and were not matters of speculation or conjecture. The evidence is such that honest minds could draw different conclusions therefrom. If this is so, then the final "coming off" of the cable involved "a balancing of probabilities or a drawing of inferences" which was solely within the province of the jury to determine as matter of fact.

> "Where from facts properly in evidence "negligence may be inferred as a conclusion of "fact, it is distinctly the function of the jury "to draw such inference, and the question of "negligence must be left to their determina-"tion."
>
> 21 Am. & Eng. Ency. Law (2nd Ed.), p. 507.

Ward Was Not Guilty of Contributory Negligence, Nor Was Contributory Negligence the Proximate Cause of the Injuries.

These questions are so closely related that a discussion of one necessarily includes the other, so

therefore we will endeavor to treat them conjunctively.

The law imposes upon the servant the obligation of exercising ordinary care and prudence in the performance of his work. It does not hold him to an exercise of unusual or extraordinary care. There is no fixed standard by which ordinary care may be judged, so therefore the policy of the law has relegated the determination of this question to the jury, under proper instructions from the Court. It is their particular province to note the special circumstances and surroundings of each particular case, and they say whether the conduct of the parties was such as to be expected of reasonably prudent men.

> *Grand Trunk R. Co.* vs. *Ives,* 144 U. S. 408, 417.

It is only when the evidence is such that all reasonable men must draw the same conclusions therefrom that it becomes a matter of law for the Court. If the evidence is contradictory or involves conflicting theories, or the exercise of judgment or discretion, then the question is one for the jury.

The defendant contended that if Ward had lifted the weight prior to attempting to replace the cable all tension would be taken therefrom, and it could have been replaced with perfect safety. By failing to adopt this method, Ward was guilty of contributory negligence, which was the proximate cause of

his injuries. In other words, if he had adopted a method which was *absolutely* safe, the injuries would not have happened. If the plaintiff's conduct is to be judged by this standard, then the law would not impose upon him an obligation to exercise ordinary, but extraordinary care and prudence, to save himself from injury. Such contention has no foundation either in law or reason. If the law obliged the servant to exercise such a high degree of care, then it would logically follow that no accident would ever happen.

On the other hand, the evidence for plaintiff shows that he was not guilty of such contributory negligence as would bar recovery, or in fact of any contributory negligence whatsoever. At all events, his conduct at the time of his injuries was such that honest men might have differed in their conclusions as to his exercise or lack of care under the circumstances. His conduct was such as to call for the exercise of judgment or discretion, and it was for the jury to say whether he employed a method which an ordinarily prudent person would have adopted if he had been placed in the same positon.

The evidence of the witnesses for the plaintiff shows that there was no necessity for raising the weight, because in their judgment and experience there was sufficient slack to replace without so doing (Rec., p. 72). The only slack necessary was two or three inches (Rec., p. 74). See also: Ward's testimony (Rec., p. 186). The evidence further

shows that the slack obtained on the Saturday immediately prior to the injuries was from the momentum of the cars, and not by lifting the weight (Rec., p. 104). On this occasion the cable had come off the pulleys to the extent of one-half the circular head. Yet, even then the raising of the weight afforded no slack, for after the cable was replaced it was observed that "the slack was still at the weight" (Rec. pp. 68, 89, 103). This testimony tended to prove that the raising of the weight had little or no effect as to slack at the scene of the injury. The evidence furthermore shows affirmatively that lifting the weight would give no slack at the scene of the injuries (Rec., p. 114). The only purpose of raising the weight was to have the cable in position so that it might be hauled around the entire conveyor, in the event it *became necessary to obtain that amount of slack* (Rec., p. 137). In others words, it was simply a preliminary operation, so if that amount of slack was required this work would have already been done. By no just or reasonable interpretation of the evidence may it be inferred that the mere raising of the weight afforded or produced slack at the scene of the injuries. At least such was the contention of the plaintiff, although controverted by the defendant. To raise the weight and haul the cable around the conveyor would take about two hours (Rec., p. 189). This was necessary only on one or two occasions when a car was derailed at the curve leading to the coal yard, and due to a broken grip and coal on the

tracks (Rec., 270-271), and occurred only two or three times during plaintiff's employment at the conveyor (Rec., p. 267).

The defendant also produced evidence of certain experiments, which were offered in support of its theory. Although interesting, perhaps, they afforded no fair test, because the machinery and motive power were different, as was also the style and make of the cable (Rec., p. 727), the difference between which was fully explained by plaintiff (Rec., pp. 727-728). This was matter of defense of which the jury was fully advised. At all events, there was a substantial conflict in the evidence. The jury, by their verdict, have held that the plaintiff during his attempt to replace the cable was exercising ordinary care. If this is so, then he could not be guilty of contributory negligence. If he was not guilty of contributory negligence, then how in reason or common sense could his act be the proximate cause of his injuries? The jury must have found that the injuries were caused by the negligence of someone, in view of the evidence in the case. If the plaintiff did not directly and proximately contribute thereto (and the jury have so found by their verdict), then the only remaining solution is that the negligence of the defendant was the direct and proximate cause of the damage.

Contributory negligence is a question of fact for the jury.

Hough vs. *Texas R. R. Co.,* 100 U. S. 213;

Cain vs. *Northern Ry. Co.,* 128 U. S. 94, 95;

Great Northern Ry. Co. vs. *Thompson,* 118 C. C. A. 79.

As was also the question whether plaintiff's act was the efficient cause of the injuries.

1 Labatt, Master & Servant, Sec. 798.

The burden of proving contributory negligence was upon the defendant.

R. R. Co. vs. *Gladmon,* 15 Wall. 401;

Indianapolis R. Co. vs. *Horst,* 93 U. S. 291;

Union Pac. R. Co. vs. *O'Brien,* 161 U. S. 451.

The Plaintiff Did Not Assume All or Any Risks of the Employment Which Resulted in the Injuries.

In consideration of this subject, it perhaps becomes material to ascertain the character of plaintiff's employment at the conveyor, all risks of which the defendant claims he assumed. The evidence shows that he had been a foreman at the conveyor at intermittent periods from the time it was erected, about five years prior to his injuries. The steel work was erected by him in accordance with plans, specifications and blue prints furnished by the defendant (Rec., p. 150). His main employment was in the machine shops of defendant (Rec., p. 149), but when a foreign coal boat arrived the secretary and treasurer of defendant "would send for him to go down to the conveyor" (Rec., p. 150), where his main employment was "bossing the men on the

ship'' so that the coal might be expeditiously handled (Rec., p. 152). The coal conveyor (upon which the cable in question was in operation) was under the direct charge of another foreman, viz, James Akina (Rec., p. 152). All the men employed on the top of the conveyor were subject to the orders of the secretary and treasurer of defendant, as was likewise the plaintiff (Rec., p. 153).

In the event repairs were necessary on the conveyor, the same were made by Akina, the regular foreman thereof (Rec., p. 173), but if the engines happened to get out of order plaintiff was sent for to repair the same (Rec., p. 174). Plaintiff had nothing to do with the cable or the installation thereof, that part of the mechanism having been placed in charge of a man specially employed for such purpose (Rec., p. 172).

The general rule is when the servant continues in his employment with knowledge of a defective appliance, he cannot recover if he is injured thereby. But if he makes complaint thereof to the master, and is assured that the defect will be remedied, and he continues in his employment in reliance upon such promise, he may recover for injuries received within a reasonable time necessary for a repair of the defect, unless the danger is so imminent that no reasonably prudent man would continue in the service.

20 Am. & Eng. Ency. of Law (2nd Ed.), p. 127.

The evidence shows that the defective condition of the cable was first called to defendant's attention about a month prior to the injuries. It moreover shows that on the Saturday immediately prior to the injuries the defendant was again advised of such condition, and (although denied by it) promised plaintiff to install a new cable (Rec., p. 178), and Ward continued in his employment in reliance upon such promise (Rec., p. 179). The promise to install a new cable was a confession of a breach of duty on defendant's part. (*McFarlane Co.* vs. *Potter,* 153 Ind. 107.) Its duty in this respect was manifest and imperative, and its assurances remove all ground for the argument that plaintiff, by continuing in the employment, was either guilty of contributory negligence or had engaged to assume the risk.

Hough vs. *Texas R. R. Co.,* 100 U. S. 225;

Nealy vs. *Oil Co.,* 64 L. R. A. 145.

Counsel seek to avoid the legal effect of plaintiff's complaint and defendant's promise to remedy by claiming that such promise was made "with respect to the efficiency of the work and not with respect to the safety of the workmen," and "did not relieve Ward, as a matter of law, from his assumption of the risks connected with replacing it(the cable) on the pulleys". The answer to this argument is:

WHY DID WARD CONTINUE IN HIS EMPLOYMENT AFTER THE PROMISE WAS

MADE? Is it a fair inference from the evidence that the inducement offered was simply that the work might be expeditiously carried on? His testimony shows that the reason why he continued in the employment was, if Akina, the luna or foreman of the upper part of the conveyor, were not present, he would be obliged to replace the cable at a portion of the conveyor which counsel admit was dangerous. We submit it makes no difference whether or not Ward pointed out the dangers to Gedge when the complaint was made. He was under no obligation, legal or otherwise, to specifically call the defendant's attention thereto. They were just as apparent to Gedge as they were to Ward, or, at all events, they could have been observed or foreseen by defendant by the exercise of ordinary care and prudence.

It was for the jury to say, under proper instructions, whether any danger was to be apprehended either from the cable or its continued use. It was also for the jury to say whether the inducing motive of Ward's continuance in the employment was his reliance upon the promise that such dangerous condition would be remedied, by the installation of a proper and suitable cable. It was moreover a question of fact whether the defendant should not have foreseen that injury of some kind might result by continuing the use of the cable in question. It would indeed be a novel doctrine to hold that when the servant has complained, and the master prom-

ised to remedy, such complaint and promise must be regarded merely with respect to efficiency of the work and not dangers, if the servant fails to specifically point out dangers which may be just as apparent to the master.

> "If it is a reasonable inference from the "testimony that the inducing motive of the "servant's continuance in the employment was "his reliance upon a promise that the dangerous "conditions would be remedied, the mere fact "that the servant knew of and appreciated the "abnormal risk which caused his injury will "not warrant a Court in declaring that his "continuance in the employment rendered him "chargeable as a matter of law with an assump- "tion of that risk, or with contributory negli- "gence."
>
> 1 Labatt, Master & Servant, Art. 423, p. 1193.

In his contract of service the plaintiff engaged to assume the ordinary risks incidental to the employment. On the other hand, the master undertook to provide for his use the means and appliances which the service required for its efficient and safe performance; and the plaintiff did not assume the risk dangers due to a defective appliance, against which the defendant had, in its contract, impliedly undertaken to protect him.

> *Northern Pac. Ry. Co.* vs. *Herbert,* 116 U. S. 642, 648;
>
> *Hough* vs. *Ry Co.,* 100 U. S. 213;

Wabash R. Co. vs. *McDaniels,* 107 U. S. 454;

Chicago R. Co. vs. *Ross,* 112 U. S. 377.

The Supreme Court of Hawaii held, when the case was first before that Court on error, that the failure to platform and rail the conveyor at the scene of the injury was one of the ordinary risks of plaintiff's employment, and necessarily assumed by him. This is correct in the sense if the injuries had resulted solely and exclusively from such failure the plaintiff could not recover. In other words, if the defendant had committed no other negligent act than to permit the scene of the injuries to remain without platform or rail, and *by virtue of this fact alone* plaintiff had been injured, then no liability would have attached, because such condition would be the moving *cause* of the injuries. But the failure to platform and rail was not the cause of the injuries. It was merely an incident or condition which possibly aggravated the same. It is, however, impossible for anyone to say whether the plaintiff would not have received just as severe injuries if there had been a platform and rail. At all events, the direct and proximate cause of the injuries was not the lack of platform and rail, but a distinct and separate instrumentality, to-wit, the defective cable. If it had not been defective it would not have left the pulleys, and plaintiff would not have been obliged to leave his employment in the ship's hold to replace it. By continuing in operation a defective cable, known by it to be defective, the defendant created

additional hazards and dangers, not incidental to the employment, which materially increased the risk of injury. Counsel in their brief contend that because Ward was the foreman of the conveyor and therefore charged with the duty of keeping the same in operation, he necessarily assumed the risk of replacing the cable. In other words, the replacing of the cable was incidental to his employment, whether caused by negligence or not. His assumption of the risk in this respect was no greater than any other mechanic whose duty was to operate his employer's machinery. The mere fact that he was a foreman does not relieve the defendant of the legal duty it owed to exercise ordinary care. The relation of master and servant existed between them, and the defendant owed him the same legal duties as it did to any other of its employees.

The servant does not assume dangers caused by the failure to exercise ordinary care.

George vs. *Clark,* 85 Fed. 608;

Labatt, Master & Servant, Vol. 3 (latest Ed.), Sec. 1178.

Increased dangers caused by negligence of the employer are not to be deemed incident to the employment.

Anglin vs. *Texas R. R. Co.,* 60 Fed. 553;

Rogers vs. *Leyden,* 127 Ind. 50.

It is only those risks alone which cannot be obvi-

ated by the adoption of reasonable measures of precaution by the master that the servant assumes.

Pantzar vs. *Mining Co.,* 99 N. Y. 368.

See also:

McGovern vs. *R. Co.,* 123 N. Y. 280;

Harrison vs. *R. Co.,* 31 N. J. L. 293.

We respectfully submit that by no reasonable interpretation of the evidence can it be said that plaintiff, under the facts and circumstances of this case, assumed the risk of the failure of defendant to adopt reasonable measures of precaution to protect him from injury; and especially so in view of plaintiff's complaint, defendant's promise to install a new cable, and his continuance in the service in reliance thereof.

We respectfully pray that the judgment of the Supreme Court of Hawaii be affirmed, with costs.

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